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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANDREW THOMPSON,

Defendant and Appellant.

B299855

(Los Angeles County  
Super. Ct. No. MA037159)

APPEAL from an order of the Superior Court of Los Angeles County, Denise McLaughlin-Bennett, Judge. Appeal dismissed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Raymond Andrew Thompson appeals from an order denying his motion to recall his sentence and resentence him pursuant to Penal Code section 1170, subdivision (d).<sup>1</sup> For the reasons explained below, we dismiss the appeal.

In March 2007, Thompson pleaded no contest to attempted murder (§§ 664, 187) and admitted allegations that the crime was a violent felony committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that he personally used a firearm (§ 12022.5, subd. (a)). The court accepted the plea, found the enhancement allegations true, and sentenced Thompson to 18 years in prison.

Twelve years later, in June 2019, Thompson filed a petition for modification of sentence under section 1170, subdivision (d).

On July 5, 2019, the court denied the petition on the ground, among others, that section 1170, subdivision (d) neither authorizes the court to recall a sentence based on a request of the defendant nor permits a court to “unilaterally change the charge [of which] the defendant was convicted.”

Thompson appealed and this court appointed counsel for him.

Thompson’s appellate counsel filed a brief raising no issues on appeal and requesting that we independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) “for arguable issues.” He notified Thompson that he would be filing the brief and that Thompson may file a supplemental brief with this court.

On June 12, 2020, this court sent a letter to Thompson informing him that he may, within 30 days, “submit by brief or letter any grounds of appeal, contentions, or argument which appellant wishes this court to consider.” Thompson did not file a supplemental brief.

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<sup>1</sup> Subsequent statutory references are to the Penal Code.

Because Thompson’s appeal is not from his conviction, he is not entitled to our independent review of the record pursuant to *Wende* or its federal constitutional counterpart, *Anders v. California* (1967) 386 U.S. 738. (See *People v. Kelly* (2006) 40 Cal.4th 106, 119; *People v. Serrano* (2012) 211 Cal.App.4th 496, 503 (*Serrano*); *Pennsylvania v. Finley* (1987) 481 U.S. 551, 559.)<sup>2</sup> Thompson is entitled, however, to file a supplemental brief and, if he files such a brief, to our review of his contentions. (See *Serrano, supra*, 211 Cal.App.4th at p. 503; cf., *Ben C., supra*, 40 Cal.4th at p. 544, fn. 6; *id.* at pp. 554–555 (dis. opn. of George, C.J.).) If no supplemental brief is filed, we may deem the appeal to be abandoned and dismiss the appeal. (*Serrano, supra*, 211 Cal.App.4th at pp. 503–504.)

Even if we did not dismiss the appeal as abandoned, it is subject to dismissal because the trial court had no jurisdiction under section 1170, subdivision (d) to consider Thompson’s motion. Section 1170, subdivision (d) provides in relevant part: “When a defendant . . . has been sentenced to be imprisoned in the state prison . . . and has been committed to the custody of the secretary [of the California Department of Corrections and Rehabilitation (CDCR)] . . . , the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary [of the CDCR] or the Board

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<sup>2</sup> Under *Serrano*, in a criminal appeal in which *Wende* does not apply, counsel who finds no arguable issues is still required to (1) inform the court that counsel has found no arguable issues to be pursued on appeal; (2) file a brief setting out the applicable facts; (3) provide a copy of the brief to appellant; and (4) inform the appellant of the right to file a supplemental brief. (*Serrano, supra*, 211 Cal.App.4th at p. 503, citing *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544 (*Ben C.*).

of Parole Hearings in the case of state prison inmates . . . or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.”<sup>3</sup>

The power to recall a sentence and resentence under section 1170, subdivision (d), may be exercised only upon the court’s own motion within the first 120 days of defendant’s prison commitment or, at any time, upon recommendation of the secretary of the CDCR, the Board of Parole Hearings, or the appropriate district attorney. (§ 1170, subd. (d); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) A defendant has no right to bring a motion under this section. (*People v. Loper* (2015) 60 Cal.4th 1155, 1165; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725; *People v. Gainer* (1982) 133 Cal.App.3d 636, 641.) A defendant may, however, invite the court to make its own motion to recall the sentence within the first 120 days of the defendant’s commitment. (*People v. Loper, supra*, 60 Cal.4th at p. 1167.) After that 120-day period, however, the court has no jurisdiction to recall a sentence on its own motion or to act upon defendant’s invitation to do so. (*Id.* at p. 1165; *People v. Chlad, supra*, 6 Cal.App.4th at p. 1725.) Because of the absence of jurisdiction in that situation, a court’s order denying a defendant’s motion filed more than 120 days after his or her commitment is not appealable, and an appeal from such an order should be dismissed. (*People v. Loper, supra*, 60 Cal.4th at

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<sup>3</sup> Title 15 of the California Code of Regulations identifies various circumstances under which the secretary of the CDCR may recommend recall of sentence and resentencing. (Cal. Code Regs., tit. 15, § 3076.1.) According to these regulations, the “[s]ecretary’s decision is final and not subject to administrative review.” (*Id.*, § 3076.1, subd. (e)(4).)

pp. 1165–1166; *People v. Chlad*, *supra*, 6 Cal.App.4th at pp. 1725, 1727; *People v. Gainer*, *supra*, 133 Cal.App.3d 636, 641–642.)

Here, Thompson filed his motion long after the 120-day period within which the court could have recalled his sentence on its own motion. In the absence of a recommendation from a person or board statutorily authorized to recommend recall and resentencing, the court had no jurisdiction to grant defendant’s motion, and its order denying the motion is not appealable. Under the authorities cited above, therefore, we are compelled to dismiss the appeal.

Regardless of whether *Wende* or *Serrano* applies, we are satisfied that Thompson’s counsel has fully complied with his responsibilities. (See *Wende*, *supra*, 25 Cal.3d at p. 441; *Serrano*, *supra*, 211 Cal.App.4th at p. 503.)

#### **DISPOSITION**

For the reasons given above, the appeal is dismissed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

SINANIAN, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.